No. 594

In the Supreme Court of the United States

October Term, 1943

BEN PEARSON, CARL B. [illegible] AND [illegible]
DOING BUSINESS AS BEN PEARSON
PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 594

BEN PEARSON, CARL B. HAUN AND J. T. HAUN, DOING BUSINESS AS BEN PEARSON COMPANY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court issued no written opinion. Its "Findings of Fact and Conclusions of Law" appear in the record (R. 54–57). The opinion of the Circuit Court of Appeals is reported in 138 F. (2d) 655 (R. 107–117).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 10, 1943 (R. 117). The

petition for a writ of certiorari was filed on January 11, 1944. Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the manufacture of bows and arrows by petitioners is subject to the Wage Order for the Lumber and Timber Products Industry issued by the Administrator of the Wage and Hour Division.

STATUTE INVOLVED

The statutory provisions involved are Sections 3 (h), 6 (a) (4), 8 and 10 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201, *et seq.* The pertinent portions of these provisions are set forth in the appendix.

STATEMENT

This action was instituted by the Administrator to enjoin petitioners from violating the Fair Labor Standards Act by failing to pay a substantial number of their employees in accordance with the provisions of the Lumber and Timber Products Wage Order issued by the former Administrator, Philip B. Fleming (Title 29, c. V, Code of Federal Regulations, part 610) (R. 5–8).

This wage order, establishing the minimum wage rate of 35 cents an hour for employees in the Lumber and Timber Products Industry subject to the Act, went into effect on November

3, 1941, almost six months after proceedings looking to its promulgation had been instituted. These proceedings included a public hearing on June 23, 24, and 25, 1941, before a tripartite industry committee (R. 82–94), and a formal hearing before the Administrator on August 5, 1941, on whether or not the committee's recommendation for a 35-cent hourly minimum wage rate should be approved (R. 6). The wage order was accompanied by findings of the Administrator, including a specific finding that the definition of the industry was appropriate and reasonable (R. 101), and by a 51–page opinion setting forth the reasons for the Administrator's decision (R. 98–105). Notices of the hearings and of the promulgation of the wage order were published in the Federal Register and widely circulated among trade organizations and in the trade and general press. These notices set forth the definition of the Lumber and Timber Products Industry, which specifically included "the manufacture of specialized timber products" (R. 7) and "all occupations in the industry which are necessary to the production of products covered in the definition" (R. 7–8).

Petitioners are engaged in the production, sale, and distribution of bows, arrows, targets, and miscellaneous items of archery equipment (R. 10). In the manufacture of bows, rough pieces of wood are sawed and shaped in petitioners' wood work-

ing department until they are reduced to the appropriate size (R. 18–19). They are then sanded by a pneumatic drum and thus prepared for the finishing department (R. 19). In the finishing department the bows are dipped in a vat of sanding sealer, sprayed with varnish and strung (R. 13). A leather handle is also glued to the bow (R. 13). In the manufacture of arrows, shafts about 30 inches long are purchased (R. 23). Before they reach the finishing department, two operations are performed on the arrow shafts. One end is tenoned or trimmed down so that a plastic point may be superimposed and the other end is shaped to receive a plastic nock, the device that holds the string. (R. 23.) In the finishing department the arrow is lacquered, the plastic point and nock are affixed, stripes are painted on by machine, and feathers are attached (R. 24–27).

The District Court found that the bows and arrows manufactured by petitioners were made of wood and that the various operations performed in the finishing department were functions necessary to the production of the completed bows and arrows (R. 55). It concluded that petitioners' employees who were engaged in the production and shipping of bows and arrows were subject to the Lumber and Timber Products Wage Order (R. 55), and granted the injunction prayed for (R. 57–59). The Circuit Court of Appeals affirmed (R. 117).

ARGUMENT

1. The ground for the allowance of the writ relied on by petitioners is that the court below incorrectly interpreted the word "define" in Section 8 (f) of the Act as not requiring the Administrator to "describe industries to be included within a Wage Order with such certainty as will enable a citizen of ordinary intelligence to know that the particular industry with which he is connected is included" (Pet. p. 5). This assertion is plainly in conflict with the language of the opinion below. After posing the question, "is the definition sufficiently specific, so that the notice based thereon * * * could fairly and reasonably be expected to advise appellants and other manufacturers of bows and arrows that they were in all reasonable certainty within the compass of the proceedings being had and of the final order made," the court below concluded that "the Administrator's definition, by its inclusion of 'the manufacture of specialized timber products' was reasonably sufficient for this purpose" (R. 110–111),[1] and that consequently petitioners were

[1] The exact wording of the definition is as follows:

"*Wood saw milling and surfacing; wood reworking*, including but without limitation kiln or air drying, and the manufacture of planing mill products, dimension stock, boxes, and wood turnings and shapings; and *the manufacture of specialized timber products* including but without limitation shingles, cooperage stock, veneer, plywood, and veneer packaging; provided, however, that the term does not include

afforded a fair legal opportunity to appear in the proceedings and to seek to have their product excluded or specially classified, and if unsuccessful, to pursue the exclusive method of review of wage orders provided by Section 10 (a) of the Act.

As far as the structure of definitions under Section 8 (f) of the Act is concerned, the Administrator's power to further the broad remedial purposes of the Act by establishing broad industry classifications in general definitions has been recognized by this Court in *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 149–150, as well as by lower Federal courts. See *Art Metal Works* v. *Walling*, 129 F. (2d) 50 (App. D. C.); *Southern Garment Mfrs. Assn.* v. *Fleming*, 122 F. (2d) 622, 629, 630 (App. D. C.); *Walling* v. *Cohen*, 7 Wage Hour Rep. 117 (C. C. A. 3, 1944); *Walling* v. *Belikoff*, 7 Wage Hour Rep. 126 (S. D. N. Y., 1944). Petitioners agree that Congress could not have intended to compel the Administrator to enumerate in his definition every specific product to which the order is intended to apply (Pet. p. 15) and they apparently have no quarrel with the

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cooperage or the manufacture of cigar boxes, cork products, reed and rattan products except vegetable and fruit baskets, or furniture and furniture parts as defined in Administrative Order No. 108.

"The manufacture of any products covered under this definition shall be deemed to begin with the unloading of the raw material at the mill site." [Italics supplied.]

court's holding that, in formulating a definition for wage order purposes, the Administrator is only required to outline with reasonable clarity and certainty the general limits or extent of the industry sought to be covered.

Even by petitioner's own standards, therefore, it is clear that the court below made no error in its construction of the applicable statutory provisions.

2. Petitioners' real objection seems to be to the lower court's factual interpretation of the definition as applying with reasonable clarity and certainty to the manufacture of bows and arrows. The court held that since, as shown by the record, wood clearly remains the predominant part of finished bows and arrows, these products are reasonably and by sound implication within the broad category of "specialized timber products" (R. 113). There is nothing in the wage order or in the record of the proceedings leading to its promulgation which would indicate that the words "specialized timber products" were used in a narrow or technical sense. On the contrary, the broad scope of the definition was recognized by other members of the industry, including those engaged in production of such specialized timber articles as excelsior and matches (R. 85–86, 89, 91–92), and was clearly indicated in the Findings and Opinion of the Administrator (R. 100) and in the "Report on Minimum Wages in the Lumber and Timber Products Industry, Prepared by Re-

search and Statistics Branch, United States Department of Labor, Wage and Hour Division, in June 1941," which was part of the record before the industry committee (R. 66–82). This report, as well as the Administrator's opinion, specifically mentions, by way of illustration, the inclusion within the industry definition of numerous types of products requiring no less complicated finishing processes and no less specialized in use than bows and arrows (R. 70, 75). The fact that the manufacture of certain products was, for reasons of administrative convenience, excluded from the industry subject to the wage order, far from supporting petitioners' contention, is a further indication that all products having wood as their principal component are included unless specifically excepted.[2]

The conclusion that the definition of the Lumber and Timber Products Industry includes with reasonable clarity and certainty the manufacture of bows and arrows is thus extremely well founded. In any event, since this question involves primarily interpretation of simple language in the light of the facts of this particular case, it does not merit review by this Court.

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[2] For example, "the definition excludes a number of products which * * * employ wood only as a component of minor importance (cigar boxes and other specialties made from paper, metal, wood and other materials in combination)." Findings and Opinion of the Administrator (R. 100).

CONCLUSION

The decision below is correct. There is no conflict. We do not believe further review is required and accordingly we oppose the issuance of the writ.

Respectfully submitted.

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